SELECTED GUIDELINE APPLICATION DECISIONS FOR THE SIXTH CIRCUIT

Prepared by the
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CHAPTER ONE: *Introduction and General Application Principles*

Part A Introduction

United States v. Duerson, 25 F.3d 376 (6th Cir. 1994). The district court refused to depart downward where the defendant's crime, robbing a UPS dispatcher and armored courier, was a product of extensive planning, finding it was not a "spontaneous and seemingly thoughtless act." The courts of appeals do not agree over the definition of "single act of aberrant behavior." *See* USSG Ch. 1, Pt. A, Intro. 4(d). The Ninth Circuit defines "single act" broadly, *see* United States v. Takai, 941 F.2d 738 (9th Cir. 1991) (finding that a bribery scheme by members of an immigrant community constituted a single act of aberrant behavior because it was not for profit and one of the members acted "irrational"). The Fourth and Seventh Circuits define "single act" narrowly, finding that any defendant who plans an offense over a period of time or any defendant who commits the offense behavior more than once has not committed a "single act of aberrant behavior." United States v. Glick, 946 F.2d 335 (4th Cir. 1991); United States v. Andruska, 964 F.2d 640 (7th Cir. 1992). The circuit court declined to address the "single act" issue, but upheld the district court's decision.

Part B General Application Principles

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

United States v. Meacham, 27 F.3d 214 (6th Cir. 1994), *cert. denied*, 117 S. Ct. 529 (1996). The district court erred in attributing to the defendants all of the narcotics distributed through the conspiracy, without making individualized findings of the amount of drugs attributable to each defendant. The district court failed to make individualized findings concerning the scope of the conspiracy, the duration of the conspiracy, and the nature of each defendant's participation in it. The case was remanded for resentencing. *See also* United States v. Peairs, 2001 WL 549437 (6th Cir. May 24, 2001), finding that district court did not focus enough on defendant's individual involvement (unpublished).

United States v. Partington, 21 F.3d 714 (6th Cir. 1994). The circuit court affirmed an enhancement under USSG §2K2.1(a)(5) for the possession of a non-operational sawed-off rifle defendant used for parts in sentencing a defendant convicted of illegal firearm sales. The circuit court held that it was not necessary for the defendant to have actually attempted to sell the firearm nor to have kept it in operating condition for it to be considered as relevant conduct in sentencing him for illegal firearms dealings. The circuit court compared illegal firearm transactions to illegal drug transactions, stating that it was sufficient that the firearm was located where the defendant conducted some of his illegal firearms transactions and that it could have easily been made operable. *See* United States v. Chalkias, 971 F.2d 1206, 1216 (6th Cir.), *cert. denied*, 506 U.S. 926 (1992).

United States v. Pierce, 17 F.3d 146 (6th Cir. 1994). The district court correctly considered the defendant's tax evasion activity that exceeded the statute of limitations. The Sixth Circuit concluded that "conduct that cannot be prosecuted under the applicable statute of limitations can be used to determine relevant conduct."

United States v. Strayhorn, 250 F.3d 462 (6th Cir. 2001). The appellate court vacated and remanded a sentence where the quantity of drugs attributed to defendant based on his relevant conduct by preponderance of evidence exceeded the statutory maximum sentence of the crime to which defendant pled guilty, thus violating his Fifth and Sixth Amendment rights.

United States v. Ukomadu, 236 F.3d 333 (6th Cir. 2001). The defendant was convicted of possession of heroin with intent to distribute. Defendant objected to the drug quantity determination of 293.3 grams of heroin that was the basis for his sentence because, before the package of heroin was in defendant's possession, the customs officials had removed most of the heroin from the package, leaving behind approximately 6 grams in the package eventually possessed by the defendant. On appeal the defendant argued that his resulting base offense level should be based on the six grams he actually possessed when the package was delivered, not the entire 293.3 grams. The Sixth Circuit disagreed and found that the defendant was personally involved as a participant who was the intended recipient of the package and who indeed took delivery of the package intended to contain 293.3 grams of heroin. The court held that because the defendant met the requirements of §1B1.3, application note 2, he was responsible for the entire 293.3 grams of heroin because it was "within the scope of the criminal activity he jointly undertook." *See also* United States v. Swiney, 203 F.3d 397, 406 (6th Cir. 2000) (held that the Pinkerton[1] principles, as articulated in the relevant conduct guideline, USSG §1B1.3(a)(1)(B), determine whether a defendant convicted under 21 U.S.C. § 846 is subject to the penalty set forth in 21 U.S.C. § 841(b)(1)(C)).

Acquitted Conduct

See United States v. Partington, 21 F.3d 714 (6th Cir. 1994), §2K2.1, p. 10.

§1B1.10 Retroactivity of Amended Guideline Range (Policy Statement)

United States v. Dullen, 15 F.3d 68 (6th Cir. 1994). The defendant was not eligible for retroactive application of an amendment to USSG §3E1.1, enacted only ten weeks after his sentence was imposed, which would have permitted an additional reduction in his offense level had it been in effect when he was sentenced. The circuit court held that this amendment may not be applied retroactively because it was not listed in USSG §1B1.10(d), which specifically identifies those amendments which were intended to be applied retroactively. *See* United States v. Desouza, 995 F.2d 323, 324 (1st Cir. 1993); *see also* United States v. Dowty, 996 F.2d 937 (8th Cir. 1993).

§1B1.11 Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

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[1]Pinkerton v. United States, 328 U.S. 640 (1946) (held that a co-conspirator may be vicariously liable for the substantive offense committed by a co-conspirator if the act is done "in furtherance of the conspiracy" and is "reasonably foreseen as a necessary or natural consequence of the unlawful agreement").

See United States v. Cseplo, 42 F.3d 360, 361 (6th Cir. 1994), §2T1.1, p. 11.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against The Person

§2A1.2 Second Degree Murder

United States v. Milton, 27 F.3d 203 (6th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995). Although the district court should have specifically considered the elements of second degree murder when it used the cross-reference from §2K2.1(c)(1), the sentence was affirmed because the appellate court, based on *de novo* review of the record, concluded that the defendant acted with "malice aforethought." The circuit court also declined to follow the Ninth Circuit's decision in United States v. Brady, 928 F.2d 844 (9th Cir. 1991).

§2A3.1 Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

United States v. Weekley, 130 F.3d 747 (6th Cir. 1997). The district court did not err in applying USSG §2A3.1(b)(1)—the use of force with a dangerous weapon enhancement—when the defendant brandished a razor while molesting a young boy.

Part B Offenses Involving Property

§2B1.2 Receiving, Transporting, Transferring, Transmitting or Possessing Stolen Property
(Deleted by consolidation with §2B1.1, effective November 1, 1993)

United States v. Warshawsky, 20 F.3d 204 (6th Cir. 1994). In considering a question of first impression in the circuit, the circuit court addressed the interpretation of "in the business of receiving and selling stolen property," §2B1.2(b)(4)(A), and endorsed the tests set forth in United States v. Esquival, 919 F.2d 957, 959 (5th Cir. 1990), and United States v. Braslawsky, 913 F.2d 466, 468 (7th Cir. 1990). Sentencing courts should examine "the defendant's operation to determine: (1) if stolen property was bought and sold, and (2) if stolen property transactions encouraged others to commit property crimes."

§2B3.1 Robbery

United States v. Moerman, 233 F.3d 379 (6th Cir. 2000). The defendant pled guilty to three counts of armed bank robbery. In each of the robberies the defendant's actions or statements did not directly threaten the tellers or the customers with the use of the firearm if they did not comply with the defendant's demands. On appeal the defendant argued that the six-level enhancement for "otherwise using" the firearm under §2B3.1 did not apply to his case because he only "brandished" the firearm and therefore should have received only a five-level enhancement on each of the two counts. The Sixth Circuit agreed. In one bank robbery, the defendant pointed the firearm in a threatening manner. In another bank robbery the defendant moved a customer aside with the barrel of the firearm without an accompanying threatening statement. The court held that the conduct of the defendant did not go beyond brandishing the weapon and reversed and remanded the case to recalculate the sentence using the five-level increase for brandishing the weapon.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

United States v. Jenkins, 4 F.3d 1338 (6th Cir. 1993). Each defendant in a drug conspiracy is responsible, for purposes of determining whether any statutory mandatory minimum penalty applies, only for the drug amount which was reasonably foreseeable to him within the scope of his agreement. Stated another way, each drug conspiracy defendant is not automatically responsible for all drugs moved by the conspiracy in which he was involved.

United States v. Cochran, 14 F.3d 1128 (6th Cir. 1994). The defendant was convicted for conspiracy to possess methamphetamine, with intent to distribute. He appealed the two-level increase added to his sentence pursuant to §2D1.1(b) for possession of a weapon during a drug offense. The defendant claimed that because he believed his co-conspirator was a "small time" drug dealer who was not known to carry a gun, it was not reasonably foreseeable to the defendant that his co-conspirator would have a gun with him during the drug buy. The circuit court reversed the firearms enhancement. Possession of a gun by one co-conspirator is attributable to another co-conspirator if such possession was reasonably foreseeable. *See* United States v. Williams, 894 F.2d 208, 211-212 (6th Cir. 1990). The test of reasonable foreseeability is an objective one. *See* United States v. Chalkias, 971 F.2d 1206 (6th Cir.), *cert. denied*, 506 U.S. 926 (1992). However, constructive possession can not be established by "mere presence on the scene plus association with illegal possessors." *See* United States v. Birmley, 529 F.2d 103, 107 (6th Cir. 1976). At a minimum, there must be "objective evidence that the defendant knew the weapon was present, or at least knew it was reasonably probable that his co-conspirator would be armed." In this case there was no such evidence.

United States v. Owusu, 199 F.3d 329 (6th Cir. 2000). Each defendant is accountable for all quantities of drugs with which he is directly involved and, in the case of jointly undertaken criminal activity (conspiracies), all reasonably foreseeable drug quantities within the scope of his agreement.

United States v. Peters, 15 F.3d 540 (6th Cir.), *cert. denied*, 513 U.S. 883 (1994). The defendants were convicted of conspiracy to possess crack cocaine with intent to distribute and possession with intent to distribute crack cocaine. The district court imposed a sentence under USSG §2D1 but found that a two-level increase for the possession of a firearm in connection with the drug offense was not warranted. The United States appealed, contending that the pistol found at the scene of the arrest warranted the increase. The circuit court upheld the sentence, finding that the district court's findings were reasonable in light of the "due deference" that must be given to a lower court's factual findings.

United States v. Powers, 194 F.3d 700 (6th Cir. 1999). When a defendant in an LSD case is entitled to be sentenced under the "safety valve" established by 18 U.S.C. § 3553(f), statutory directions as to how the amount of the LSD should be determined do not control. Rather, in such cases, the LSD is to be weighed under the formula expressed in Amendment 488 to the federal sentencing guidelines. The guideline method is used because qualifications as a "safety valve" defendant removes that defendant from the scope of statutory (mandatory minimum) penalties.

United States v. Sonagere, 30 F.3d 51 (6th Cir.), *cert. denied*, 513 U.S. 1009 (1994). The defendant asserted that the provisions of USSG §2D1.1 are unconstitutional. Under that section, the district court held the defendant responsible for the manufacture of 219 kilograms of marihuana. On appeal, the defendant argued that USSG §2D1.1(c) is "irrational" and violated his right to substantive due process. The Sixth Circuit disagreed. In a brief opinion on the sentencing issue, the Sixth Circuit stated that it had "expressly rejected" the precise argument made by the defendant in United States v. Holmes, 961 F.2d 599, 601-03 (6th Cir.), *cert. denied*, 506 U.S. 881 (1992).

United States v. Stevens, 25 F.3d 318 (6th Cir. 1994). The district court erred in calculating the amount of marijuana for which the defendant was responsible. The sentencing judge based the calculation on the number of marijuana plants the defendant's supplier grew, instead of on the weight of the marijuana the two conspired to possess. The circuit court joined the Second and Eleventh Circuits in holding that the marijuana equivalency provision applies only to plants that have not been harvested; offense levels for dry leaf marijuana are to be determined "based upon the actual weight of the [drug] and not based upon the number of plants from which the marijuana was derived." *See* United States v. Blume, 967 F.2d 45 (2d Cir. 1992); United States v. Osburn, 955 F.2d 1500 (11th Cir.), *cert. denied*, 506 U.S. 878 (1992); *but see* United States v. Haynes, 969 F.2d 569 (7th Cir. 1992) (the equivalency provision applies to dry leaf marijuana when it is known how many plants were used to make the marijuana). The circuit court determined that its decision was consistent with earlier versions of the guidelines which calculated offense levels for harvested marijuana based on weight, not on the number of plants which yielded that amount of marijuana. Its decision is consistent also with section 6479 of the Anti-Drug Abuse Act of 1988 in which Congress, when drafting the mandatory minimum provisions, distinguished between marijuana plants and dry leaf marijuana.

United States v. Vincent, 20 F.3d 229 (6th Cir. 1994), *habeas corpus granted*, 1996 WL 495575 (W.D. Mich. Jul. 3, 1996) (No. 96-CV-50). The district court did not err by failing to exclude the weight of the marijuana stalks and seeds in calculating the weight of the marijuana. Section 2D1.1 provides that "mixture or substance" does not include portions of a drug mixture that

have to be separated from the controlled substance before the controlled substance can be used. The stalks and seeds of a marijuana plant contain amounts of a controlled substance and need not be separated before the controlled substance can be used. However, the district court erred in concluding that the defendant's conviction for possession of a firearm by an unlawful user of a controlled substance was not an underlying offense to defendant's unlawful use or carrying of a firearm during and in relation to a drug trafficking offense. In order to avoid double counting, §2K2.4 requires that the district court not apply any specific offense characteristic for firearm discharge, use, or possession with respect to the defendant's sentence when a sentence is imposed in conjunction with a sentence for the underlying offense. This case is distinguishable from United States v. Sanders, 982 F.2d 4 (1st. Cir. 1992), *cert. denied*, 508 U.S. 963 (1993), which considered violations of 18 U.S.C. §§ 922(g) and 924(c), where "there was no double counting under USSG §2K2.4 because the defendant's base offense level was not increased by a specific offense characteristic. In this case, however the district court increased the defendant's base offense level by specific offense characteristics."

United States v. Ward, 190 F.3d 483 (6th Cir. 1999). Even drug quantities involved in an acquitted count can be counted for sentencing purposes when the defendant's involvement with the drugs is proven by a preponderance of the evidence.

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit

United States v. Flowers, 55 F.3d 218 (6th Cir.), *cert. denied*, 516 U.S. 901 (1995). In its first published opinion addressing the issue, the appellate court held that the amount of loss in a check kiting case is determined at the time the crime "was detected, rather than at sentencing, and that defendants convicted of bank fraud by check kiting will not be permitted to buy their way out of jail by subsequently making voluntary restitution." The fact that the check kiters made restitution to the bank prior to sentencing cannot alter the "fact of loss." The sentences were affirmed.

United States v. Sanders, 95 F.3d 449 (6th Cir. 1996). The district court did not err by calculating the loss for sentencing purposes as the total amount of premiums collected by the conspiracy nor by distinguishing this fraudulent insurance scheme from secured loan fraud cases. The defendant argues that the district court should have calculated the amount of loss for sentencing purposes as the $97,835.60 the defendant was ordered to pay in restitution to the victims, rather than the $729,139.00 in premiums collected by the entire conspiracy. Under USSG §2F1.1(b), the district court is required to increase the defendant's base offense level depending on the amount of loss caused by the fraud at issue. Additionally, Application Note 7 states that "loss is the value of the money, property, or services unlawfully taken . . . [I]f an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss." The circuit court held that the Application Note clearly shows that the amount of loss should be the amount of premiums collected, and the entire amount involved in the conspiracy is attributable to the defendant, because "all the conspirators' activities were reasonably foreseeable" to the defendant. The appellate court also found no error in distinguishing fraudulent loan application cases from fraudulent insurance schemes. The court relied on the fact that in the former, the victim may recoup some of the losses by selling collateral that the defendant used to

secure the loan, whereas in the latter, such as the defendant's scheme, the victims are not left with any collateral to sell.

United States v. Scott, 74 F.3d 107 (6th Cir. 1996). The district court did not err in calculating the amount of loss under USSG 2F1.1. Using his position as a bank employee, the defendant defrauded the bank by causing $75,546.22 (including $1709 in interest on the account) to be placed into fictitious accounts that he had created. Prior to termination of his employment with the bank, the defendant was negotiating a transaction for the bank which would have entitled him to a $64,712.40 commission. He completed the negotiation, and the bank retained the commission. At sentencing, the district court determined that the actual loss to the bank was $74,546.22. The defendant argued that since the bank received $64,712.40 from the commission earned by the defendant, the actual loss was only $9,834.60. The defendant's argument relies on the notion that collateral secured by the creditor in fraudulent loan transaction cases is used to offset the amount of the loss. The circuit court distinguished the present fraudulent lease transaction from fraudulent loan transaction cases by noting that collateral is not posted as security in the former cases. In doing so, the circuit court concluded that the voluntary offering to the bank, made after the offense was uncovered, of the earned commission is not the same as putting up collateral as security. Consequently, the district court was correct in assessing the amount of loss at $74,546.22.

United States v. Sparks, 88 F.3d 408 (6th Cir. 1996). The district court did not err in calculating the amount of loss under USSG §2F1.1. The defendant was convicted of falsifying bank records and misapplying bank funds, 18 U.S.C. §§ 656 and 1005, based on fraudulent loans made to third parties for the benefit of himself. The defendant asserts that the loss calculation was incorrect because the bank's loss was subsequently reduced when a third party paid the balance due on two of the loans. The circuit court stated that amount of loss is typically determined at the time the crime is discovered rather than at sentencing. The circuit court noted, however, that loss does not include amounts recoverable by "foreclosure, setoff, attachment, simple demand for payment, immediate recovery from the actual debtor and other similar legal remedies . . . ." The circuit court found that the subsequent repayment was not an immediate repayment as it was made over a year after the fraud was unearthed. The circuit court held that although this repayment reduced the amount of the bank's final loss, the "loss" at the time the crime was discovered is not lowered because, at that time, the bank did not have an expectation of "immediate recovery" from the actual debtor or by legal means. Lastly, while a reduction in the amount of loss is appropriate for amounts that a bank has or may expect to recover from assets originally pledged as collateral, the loans in question were not secured. Consequently, the circuit court held that the calculation of amount of loss was correct in this case.

Part G Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity

§2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic

United States v. Surratt, 87 F.3d 814 (6th Cir. 1996). The district court did not err in its refusal to apply the five-level increase under USSG §2G2.2(b)(4) because the enhancement is

available only when there exists a pattern of behavior that is "relevant" to the offense of conviction. The government challenged the lower court's refusal to consider any testimony or exhibits pertaining to the defendant's uncharged prior acts of sexual abuse and exploitation of minors. The government contended that such evidence of a prior "pattern of activity" justified a five-level enhancement. Relying on the First Circuit's decision in United States v. Chapman, 60 F.3d 894, 901 (1st Cir. 1995), the circuit court held that there were limitations as to what conduct the court could consider to determine the applicability of USSG §2G2.2(b)(4). The offenses covered by §2G2.2 relate to trafficking in materials portraying the sexual exploitation of minors, not to the act of sexually exploiting a minor. The government's broad construction of subsection (b)(4) would have made the conduct apply to acts completely unrelated to the trafficking offenses addressed by the guideline. Additionally, the circuit court reasoned that the existence of application note 5, which allows an upward departure on the basis of the defendant's past sexual abuse or exploitation of minors "whether or not such sexual abuse occurred during the course of the offense," strongly suggested that non-discretionary enhancements under subsection (b)(4) were directed at a more limited class of conduct.

Part J Offenses Involving the Administration of Justice

§2J1.2 Obstruction of Justice

United States v. Levy, 250 F.3d 1015 (6th Cir. 2001). The defendant pled guilty to solicitation to commit a crime of violence in violation of 18 U.S.C. § 373, retaliating against a witness, in violation of 18 U.S.C. § 1513, and being an accessory after the fact under 18 U.S.C. § 3. On appeal the defendant argued that the eight-level increase under §2J1.2(b)(1) for the specific offense characteristic of causing physical injury to the witness constituted improper double counting as it was the conduct for which he was convicted and was considered in formulating his base offense level. He further argued that upward departures under §§5K2.2 (Physical Injury) and §5K2.8 (Extreme Conduct) amounted to double counting because those provisions punished conduct taken into account in §2J1.2(b)(1), and the conduct overlapped. The Sixth Circuit disagreed. The language of the statute, 18 U.S.C. § 1513, criminalizes retaliation against a witness that involves actual or *threatened* bodily injury. Because the base offense level applied to convictions under § 1513, regardless of whether bodily injury occurred, double counting did not occur because the eight-level increase under §2J1.2(b)(1) did not take into account conduct that was already taken into account in setting the base offense level. Upward departures for use of a weapon, bodily injury, or significant property damage were encouraged under §2J1.2(b)(1), Application Note 4. As a result, the departures would not be considered double counting. Section 2J1.2(b)(1) was applied because the offense caused physical injury, but §5K2.2 directs the court to consider the "extent of the injury." No double counting existed between §2J1.2(b)(1) and §§5K2.2 and 5K2.8 because §5K2.2 focused solely on the extent of the physical injury, and §5K2.8 focused on the depravity of the defendant's conduct.

§2J1.7 Commission of Offense While on Release

United States v. Lanier, 201 F.3d 842 (6th Cir. 2000). The defendant, formerly a sole state Chancery Court judge, was convicted of deprivation of rights under the color of law, in violation of 18 U.S.C. § 242, for sexually assaulting several women in his judicial chambers. During en

banc proceedings, the defendant was released on his own recognizance and his conviction was set aside for lack of any notice to the public that the governing statute included simple or sexual assault crimes within its coverage. On appeal, the U.S. Supreme Court vacated the en banc judgment and remanded the case to the Sixth Circuit at which point the court entered an order requiring the defendant to surrender to the U.S. Marshal of the Western District of Tennessee. After the defendant failed to appear on the date ordered, he was charged with failure to appear in violation of 18 U.S.C. § 3146. At sentencing, the district court applied the sentencing enhancement to the defendant's offenses pursuant to 18 U.S.C. § 3147 and a three-level increase to the defendant's offense level under §2J1.7 for committing the offense while on release. On appeal, the defendant argued that the district court erred by applying these enhancements because the three-level enhancement set forth in these sections should not apply when the offense of conviction is failure to appear, an offense that is necessarily committed while on release. The Sixth Circuit disagreed. Citing United States v. Benson, 134 F.3d 787, 788-89 (6th Cir.), *cert denied*, 525 U.S. 932 (1998), the court concluded that "section 3147 clearly and unambiguously mandates that the courts impose additional consecutive sentences on persons convicted of crimes they commit while released . . . . " The enhancement of the defendant's sentence was affirmed and was not considered as constituting impermissible multiple punishments for the same crime.

Part K Offenses Involving Public Safety

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

United States v. Cobb, 250 F.3d 346 (6th Cir. 2001). The defendant pled guilty to disposing of a firearm to a convicted felon in violation of 18 U.S.C. § 922(d). Defendant had smuggled a pistol to her boyfriend while he was in jail with the belief that the weapon would be used to kill the person who had raped the defendant's mother. The defendant's boyfriend ended up using the pistol to shoot and kill a deputy while attempting to escape from custody. At sentencing, the district court applied the cross-reference under §2K2.1(c)(1) which cross-references to §2A1.1, the first degree murder guideline and sentenced the defendant under §2A1.1. On appeal, the defendant argued that §2K2.1(b)(5) should have been applied instead because she did not have the "knowledge or intent" that the Deputy would be killed but only had "reason to believe" that the firearm would be used in connection with another felony offense. The Sixth Circuit disagreed and affirmed the application of the cross-reference to §2A1.1, under §2K2.1(c)(1)(B), and found that if the defendant had the requisite state of mind with respect to that general offense and death resulted, then §2K2.1(c)(1)(B) was applicable.

See United States v. Dalecke, 29 F.3d 1044, 1047 (6th Cir. 1994), §5K2.0, p. 25.

See United States v. Milton, 27 F.3d 203 (6th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995), §2A1.2, p. 3.

United States v. Mise, 240 F.3d 527 (6th Cir. 2001). The defendant was convicted of manufacturing and possessing an unregistered pipe bomb. On appeal the defendant argued that the district court erred in applying a four-level enhancement for possession or transfer with knowledge, intent, or reason to believe that the pipe bomb would be used or possessed in

connection with another felony under §2K2.1(b)(5). The Sixth Circuit affirmed the four-level enhancement and found that defendant knew of the plan to use the pipe bomb to injure another person and also testified himself that "a pipe bomb was a destructive device used to hurt people."

United States v. Partington, 21 F.3d 714 (6th Cir. 1994). The circuit court affirmed an enhancement under USSG §2K2.1(a)(5) for the possession of a non-operational sawed-off rifle defendant used for parts in sentencing a defendant convicted of illegal firearm sales. The circuit court held that it was not necessary for the defendant to have actually attempted to sell the firearm nor to have kept it in operating condition for it to be considered as relevant conduct in sentencing him for illegal firearms dealings. The circuit court compared illegal firearm transactions to illegal drug transactions, stating that it was sufficient that the firearm was located where the defendant conducted some of his illegal firearms transactions and that it could have easily been made operable. *See* United States v. Chalkias, 971 F.2d 1206, 1216 (6th Cir.), *cert. denied*, 506 U.S. 926 (1992).

Part Q Offenses Involving the Environment

§2Q1.2 Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification

United States v. Rutana, 18 F.3d 363 (6th Cir. 1994). The district court erred in declining to increase the defendant's offense level for the disruption of a public utility. The circuit court disagreed with the district court's determination that the defendant merely "impact[ed]," but did not disrupt, a public utility when he knowingly participated in discharging pollutants into a public sewer system. The circuit court, noting that "the expenditure of substantial sums of money" was not required to prove that a disruption of a public utility occurred, held that the defendant's discharges constituted a "disruption" and not an "impact" because they caused the waste water treatment plant responsible for treating the contaminated sewer line to violate its clean water permit.

Part T Offenses Involving Taxation

§2T1.1 Tax Evasion

United States v. Cseplo, 42 F.3d 360 (6th Cir. 1994). The district court did not err in calculating "tax loss" by aggregating a corporate tax loss of 34 percent of the unreported corporate income (corporate tax rate) and an individual tax loss of 28 percent of unreported individual income (individual tax rate), where the defendant was convicted of willfully unreporting income on his wholly owned corporation's federal income tax return and of willfully attempting to evade individual income taxes by preparing and signing a return that failed to report the receipt of sums skimmed from the corporation. The defendant argued that the district court should followed the method endorsed by the Seventh Circuit in United States v. Harvey, 996 F.2d 919 (7th Cir. 1993), by reducing his unreported individual income by the amount of additional tax that his corporation would presumably have paid if its return had been accurate. The circuit court rejected this argument, reasoning that the method used by the district court met the guidelines' accuracy requirements. Moreover, the approach used in Harvey was not appropriate in this case because

Harvey assumes that the defendant committed "a single crime, [that] causes both corporate and personal income to be understated," and because it assumes that the funds diverted to the defendant's personal use constitute a "disguised dividend," the size of which would have been reduced by the amount of the corporate tax if the "dividend" had been paid openly. The circuit court found that neither of these assumptions applied to the defendant's case, concluding that there was no justification for proceeding as if only one crime had been committed.

Part X Other Offenses

§2X1.1 Conspiracies, Attempts, Solicitations

United States v. DeSantis, 237 F.3d 607 (6th Cir. 2001). The district court erred in granting a three-level reduction for an attempted bankruptcy fraud, pursuant to §2X1.1(b)(1). The defendant pled guilty to crimes arising out of a scheme to execute and conceal a bankruptcy fraud. The defendant filed a petition for bankruptcy that had failed to disclose almost one million dollars in assets. The trustee discovered the fraud, and no actual loss resulted. The district court granted the defendant a three-level reduction under §2X1.1(b)(1) for an attempted offense, and the government appealed. The appellate court reversed, concluding that because the defendant's bankruptcy fraud was completed upon the filing of the petition, the act was completed. The appellate court rejected the district court's reliance on United States v. Watkins, 994 F.2d 1192 (6th Cir. 1992). The appellate court noted that whether a §2X1.1 reduction for mere attempts applies is controlled by whether "the defendant completed all acts the defendant believed necessary for successful completion of the substantive offense . . ." §2X1.1(b)(1). The substantive offense was the fraud itself, not the deprivation of a particular sum. Once the defendant filed the petition, the substantive offense was completed.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Curley, 167 F.3d 316 (6th Cir. 1999). The district court did not err in applying the vulnerable victim enhancement. The defendant contended that the government had failed to show that he targeted older victims due to their vulnerability. The circuit court found that the targeting requirement was no longer required and that the defendant's claim that he did not know the victim's vulnerability was suspect. The enhancement applies if the defendant knew or should have known that the victim's unusually vulnerable.

§3A1.2 Official Victim

United States v. Hudspeth, 208 F.3d 537 (6th Cir. 2000). The defendant was convicted of threatening a state prosecutor by mailing threatening communications in violation of 18 U.S.C. § 876. On appeal, the defendant claimed that the three-level enhancement added to the defendant's sentence pursuant to §3A1.2(a) should not have been applied because the term "government officer

or employee" refers only to federal employees, not to state or local employees such as the state prosecutor in this case. Defendant further argued that 18 U.S.C. § 1114, to which §3A1.2(a) referred prior to amendment in 1992, criminalized only the killing of these officers "on account of the performance of their official duties," and not because of their "official position," and was amended to expand protection only to federal employees from retaliatory conduct similarly conduct similarly based on status, not to expand protection to state and local employees. The Sixth Circuit disagreed and held that criminal sentences may be enhanced pursuant to §3A1.2(a) if the underlying conduct was motivated by the victim's status as a state or local government employee.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Gort-Didonato, 109 F.3d 318 (6th Cir. 1997). The district court erred in applying a two-level enhancement to the defendant's sentence under USSG §3B1.1(c) for being an organizer, leader, manager, or supervisor of a criminal activity. The defendant argued that she did not exert control over the other participants in the criminal enterprise. Prior to November 1, 1993, the enhancement was warranted under §3B1.1(c), where the government was able to establish, by a preponderance of the evidence, that the defendant exercised a managerial, leadership, organizational or supervisory role in a criminal enterprise and four or less individuals were involved. The guideline did not require that these other participants be subordinate to the defendant, just that the activity involved five or more people. Application Note 2 was added to clarify confusion amongst circuit courts as to the operation of the guideline. Prior to the amendment, some circuits had concluded that a defendant's control over the property and assets warranted a §3B1.1 enhancement. United States v. Chambers, 985 F.2d 1263 (4th Cir.), *cert. denied*, 510 U.S. 834 (1993). Other circuits only applied the enhancement where the defendant exercised full control over at least one participant. United States v. Fuentes, 954 F.2d 151 (3d Cir.), *cert. denied*, 504 U.S. 977 (1992). However, under the amended provision, the method by which the defendant's sentence was increased depended on whether the defendant exercised control over an individual or over a piece of tangible property. If the defendant exercised control over a person, then a sentence enhancement was required. As an issue of first impression in the Sixth Circuit, the appellate court looked to several other examples in which the defendant, by virtue of the timing of the defendant's sentence, was entitled to the clarification set out in Application Note 2. These cases did not support the government's contention that a defendant's control over a scheme, rather than over a participant in a scheme, requires enhancement of a sentence under USSG §3B1.1. In the instant case, the defendant's sentence was imposed subsequent to the effective date of the Application Note 2. Accordingly, the amended commentary clarifying the method to be used to increase a sentence when a defendant exercises control over a participant applies to her sentence. The appellate court concluded that the defendant did not engage in such a leadership role and, therefore, the enhancement was unwarranted.

United States v. Sanders, 95 F.3d 449 (6th Cir. 1996). On the government's cross-appeal, the circuit court vacated and remanded the defendant's sentence for further consideration because the district court failed to clearly articulate its reasoning for imposing a two-level enhancement rather than the four-level enhancement under USSG §3B1.1(a) for leaders or organizers. The government argued that the district court erred by imposing only a two-level enhancement when its

own findings required a larger enhancement. The circuit court agreed that the district court had previously found that the defendant was the organizer of the conspiracy and that the conspiracy was "extensive" because the activities in furtherance of the offense took place in several states. Nonetheless, the circuit court noted that other portions of the sentencing transcript indicated that the district court may have been giving only its preliminary thoughts on the case when it made those findings inasmuch as the court ultimately concluded that only a two-level enhancement was warranted. Due to the speculative nature of the lower court's conclusion, the sentence was remanded for clarification on the organizer/leader and extensive conspiracy issues. If the district court finds that the defendant did play a leading role, and his fraud involved five or more participants or was otherwise extensive, the district court must impose the four-level enhancement.

§3B1.3 Abuse of Position of Trust or Use of Special Skill

United States v. Brogan, 238 F.3d 780 (6th Cir. 2001). The defendant pled guilty to bank fraud in violation of 18 U.S.C. § 1344. Defendant was the assistant treasurer of a Michigan corporation from which he misappropriated, through means of a fraudulent wire transfer, the sum of $7.9 million. The defendant's sentence was enhanced for his abuse of position of trust based on three factors: 1) the job description of the defendant's position found in the pre-sentence report; 2) the willingness of his superior to believe his explanation of the wire transfer; and 3) the sheer size of the theft. On appeal, the defendant argued that the two-level adjustment for abuse of trust was not applicable because his former job did not qualify as a "position of trust." The Sixth Circuit agreed, and found that the enhancement under §3B1.3 was meant to discourage violations of the kind of trust shown to fiduciaries and public officials. The misplaced reliance and lack of supervision the corporation showed the defendant was not this sort of institutionalized and necessary trust relationship. The court concluded that the defendant did not have a position of trust, and therefore he could not abuse the position. Defendant's sentence was reversed and remanded for resentencing. *See also* United States v. Tribble, 206 F.3d 634, 637 (6th Cir. 2000) (held that a postal window clerk did not hold a position of trust because the position did not require the type of trust in the discretion of a fiduciary or manager as the application notes indicated was required under §3B1.3).

United States v. Godman, 223 F.3d 320 (6th Cir. 2000). The defendant pled guilty to counterfeiting Federal Reserve notes in violation of 18 U.S.C. § 471. The defendant had no formal computer training and only used an off-the-shelf software program which he learned in less than a week. At sentencing, the district court applied a two-level enhancement under §3B1.3 for use of a special skill by the defendant based on his use of computer skills. On appeal, the defendant challenged the application of the enhancement under §3B1.3 and argued that his skills of making the bills were not special skills for the purpose of applying §3B1.3. The Sixth Circuit agreed, citing Application Note 3 in the Commentary of §3B1.3 which provides that "special skill" refers to a skill not possessed by members of the general public and usually requiring substantial education, training, or licensing such as pilots, doctors, lawyers, and demolition experts. The court held that the defendant's computer skills could not reasonably be equated to the skills possessed by the professionals listed in Application Note 3. Defendant's sentence was vacated and remanded for re-sentencing.

Part C Obstruction

§3C1.1 Obstructing or Impeding the Administration of Justice

United States v. Brown, 237 F.3d 625 (6th Cir. 2001). The defendant was convicted of producing and possessing child pornography. Prior to the defendant's arrest, he had threatened to stab a child whom he had repeatedly molested. On appeal, the defendant argued that the threats to the child did not warrant application of the enhancement under §3C1.1 because at the time he made the threats, the investigation had not focused on him so he could not have been *willfully* obstructing the investigation until after his arrest. The Sixth Circuit disagreed and joined the Fifth and Eighth Circuits in holding that the obstruction adjustment applies where a defendant engages in obstructive conduct with knowledge that he or she is the subject of an investigation or with the "correct belief" that an investigation is "probably underway." United States v. Lister, 53 F.3d 66, 71 (5th Cir. 1995); United States v. Oppendahl, 998 F.2d 584, 586 (8th Cir. 1993). The court found that the defendant's chat room comment "God, I hope he don't have any of my privates on there," was sufficient evidence to make it clear that he knew prior to his arrest that he was under investigation and concluded that application of the level enhancement under §3C1.1 was proper.

United States v. Mise, 240 F. 3d 527 (6th Cir. 2001). The defendant was convicted of manufacturing and possessing an unregistered pipe bomb. On appeal, the defendant argued that the district court failed to make proper findings of fact to support its findings that he committed perjury in his trial testimony. The Sixth Circuit affirmed the two-level enhancement for obstruction of justice under §3C1.1. Citing United States v. Dunnigan, 507 U.S. 87, 94 (1993) and United States v. Sassanelli, 118 F.3d 495, 501 (6th Cir. 1997), the court required the district court to fulfill two requirements for applying the adjustment for obstruction of justice under §3C1.1 to a defendant committing perjury: "first, it must identify those particular portions of the defendant's testimony that it considers to be perjurious, and second, it must 'either make specific findings for each element of perjury or at least make a finding that encompasses all of the factual predicates for a finding of perjury'. " In this case the district judge both identified the conflict between the tape-recorded comments in which the defendant admitted making the bomb and the trial testimony where he denied making the bomb and made specific findings for each element of perjury meeting its burden under Dunnigan and Sassanelli.

United States v. Perry, 30 F.3d 708 (6th Cir. 1994). The district court erred in enhancing the defendant's sentence for obstruction of justice pursuant to USSG §3C1.1. The defendant defied the district court's order to appear clean shaven at his jury trial for bank robbery. As a result, the teller was unable to identify the defendant as the bank robber. The district court relied on this conduct to justify a six-month term for contempt and an enhancement for obstruction of justice. The circuit court concluded that this amounted to impermissible double-counting because the same conduct formed the basis for both the contempt sentence and the obstruction of justice enhancement. The district court could have avoided double-counting by following application note 6, which prescribes the proper method of calculating a sentence when the defendant is convicted both of the obstruction offense (here, the contempt) and the underlying conduct.

Part D Multiple Counts

§3D1.4 Determining the Combined Offense Level

United States v. Valentine, 100 F.3d 1209 (6th Cir. 1996). The district court erroneously departed upward two levels pursuant to USSG §3D1.4. The defendant appealed his sentence for seven bank robberies on the basis that the lower court improperly interpreted the guideline provision. The district court justified the departure on the basis that the defendant had robbed seven banks, but, under §3D1.4, which accounts for multiple group offenses, the defendant would only be punished for five. The guidelines only allow such departures for "significantly more than five units," and the appellate court, interpreting the inherently subjective language of the statute, concluded that "the Guidelines did not envision seven units as within that range of "significantly more than five." The appellate court further noted that the lower court's departure was unreasonable because it was at odds with the guidelines' fundamental principle of producing declining marginal punishments.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Castillo-Garcia, 205 F.3d 887 (6th Cir. 2000). The defendant pled guilty to re-entering the United States after deportation. At sentencing the defendant's request for an acceptance of responsibility reduction was rejected because of his history of illegal re-entries and because of the lack of remorse he showed to the probation officer when he said he would re-enter the country again after deportation. On appeal the defendant argued that his efforts to accept responsibility were not outweighed by the fact that he had re-entered the country illegally on previous occasions. The Sixth Circuit disagreed. The court found that it was particularly appropriate to refuse a downward adjustment for acceptance of responsibility when a defendant is a repeat offender of the same statute and that a defendant's lack of remorse was a valid consideration under §3E1.1.

United States v. Jeter, 191 F.3d 637 (6th Cir. 1999). The district court did not err by refusing to find that the defendant accepted responsibility when the defendant committed pre-indictment misconduct. The defendant pleaded guilty and cooperated with the government, but following his June 1996 state charge arrest for loan fraud conduct (and prior to his November 1997 federal indictment), the defendant engaged in additional fraudulent conduct; accordingly, the district court could properly find the defendant did not qualify for the reduction. (J. Kennedy dissented.)

United States v. Roper, 135 F.3d 430 (6th Cir.), *cert. denied*, 118 S. Ct. 2306 (1998). The district court did not err in denying the defendant an acceptance of responsibility reduction when the defendant fabricated an entrapment defense.

United States v. Smith, 245 F.3d 538 (6th Cir. 2001). The defendant pled guilty to possession with intent to distribute crack cocaine and cocaine. At sentencing, the district court determined that defendant's untimely acceptance of responsibility only qualified him for a two-point reduction under §3E1.1(a), and not a three-point reduction under §3E1.1(b). On appeal, the defendant argued that the district court erred in not granting him the additional one level for acceptance of responsibility under §3E1.1(b). The court held that the defendant's delay until the eve of the trial to enter a guilty plea compelled the government to prepare its entire case for trial. The court affirmed the two-level reduction for acceptance of responsibility and affirmed the defendant's sentence.

United States v. Surratt, 87 F.3d 814 (6th Cir. 1996). Upon the government's appeal, the appellate court reversed the district court's decision awarding the defendant a two-level reduction for acceptance of responsibility under USSG §3E1.1. The appellate court noted that whether the defendant has accepted responsibility for purposes of the guideline reduction is a factual determination which is accorded great deference; subject to reversal on appeal only if the decision was clearly erroneous. However, upon review of the entire record, the court determined that the defendant had not carried his burden of showing by a preponderance of the evidence that he merited the reduction. The presentence report stated that the defendant persistently attempted to deny and minimize his criminal conduct. It specifically noted that the defendant blamed his abuse

of his wife and daughter and his act of ordering child pornography on drug abuse. The district court "did not refer to the `appropriate considerations' for such a determination listed in application note 1 to USSG §3E1.1."

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.2 Definitions and Instructions for Computing Criminal History

United States v. Buford, 121 S. Ct. 1276 (2001). The defendant pled guilty to armed bank robbery, a crime of violence, but also had five prior state convictions, four of which were robberies. The four bank robberies were considered related because the court found that the robberies were the subject of a single criminal indictment and the defendant pled guilty to all four at the same time in the same court. The fifth conviction was for a drug crime. The defendant argued that all five priors, including the drug crime, were related because they were "functionally consolidated," without entry of a formal order of consolidation, because the sentencing judge was the same, and all five cases were sentenced at the same time in a single proceeding. The government disagreed, stating that the drug offense was handled by a different judge, a different state prosecutor, and had a separate judgment. The district court ruled against the defendant and held that the drug case was unrelated to the robbery cases and had not been consolidated for sentencing, either formally or functionally. The Seventh Circuit stated that in this case "the standard of appellate review may be dispositive" and elected to review the district court's decision "deferentially" rather than "de novo." The appellate court affirmed and the defendant appealed. The U.S. Supreme Court held that the appellate court properly reviewed the district's court's "functional consolidation" decision deferentially in light of the fact-bound nature of the decision, the comparatively greater expertise of the district court, and the limited value of uniform court of appeals precedent.

United States v. Harris, 237 F.3d 585 (6th Cir. 2001). The defendant was convicted of the manufacture, attempt to manufacture, and possession with intent to distribute more than 100 grams of methamphetamine. Defendant had two 14-year-old prior concurrent three-year state sentences on which he was paroled after 18 days. At sentencing the district court assessed six criminal history points for the defendant's priors as directed under §4A1.1(a) and (b), instructing the court to add three points for each prior sentence of imprisonment exceeding one year and one month, and two points for each "prior sentence" totaling 60 days to 13 months. The defendant objected to the criminal history points assessed, arguing that he only served 18 days for those sentences. His objection was overruled. On appeal, the defendant argued that only one criminal history point should have been assigned under §4A1.2(c) and that, according to §4A1.2(b)(2), criminal history points should not have been assigned to him for the two prior state convictions because his release on parole after serving 18 days acted as a "suspension" of those sentences. The Sixth Circuit

disagreed. Citing Doyle v. Hampton, 207 Tenn. 399, 340 S.W.2d 891,893 (Tenn. 1960)[2] the court concluded that Tennessee state law treated the defendant's release after 18 days in 1984 as a correctional parole, not a court-mandated suspended sentence, and held that the district court did not err in increasing the defendant's base offense level by six points based on his prior state convictions.

§4A1.3 Adequacy of Criminal History Category

United States v. Barber, 200 F.3d 908 (6th Cir. 2000). The district court did not abuse its discretion in departing upward from Criminal History Category IV to Criminal History Category VI. There was ample support in the record to justify the district court's conclusion that, pursuant to §4A1.3, the defendant's criminal past and likelihood of recidivism were not adequately represented by his otherwise applicable guideline range.

United States v. Schultz, 14 F.3d 1093 (6th Cir. 1994). The district court erred in departing from defendant's criminal history category of III to the career offender category of VI based on two prior convictions that were too old to be counted. The Sixth Circuit held that the two prior convictions could be considered as a basis for an upward departure pursuant to USSG §4A1.3, but, if counted, would only have resulted in defendant being assigned to Criminal History Category IV. The district court erred in departing to Criminal History Category VI by stating that the defendant would have been a career offender if those two prior convictions had been counted, without articulating why categories IV and V were insufficient.

United States v. Thomas, 24 F.3d 829 (6th Cir.), *cert. denied*, 513 U.S. 976 (1994). The district court's upward departure was appropriate in light of the defendant's criminal history score of 43, and his high likelihood of recidivism. Furthermore, the district court is not required to provide a mechanistic recitation of its rejection of the intervening offense level guideline ranges when departing beyond Criminal History Category VI; the court must only "use the offense level ranges as a reference, and depart from them no further than is required to reach a gridblock that contains a reasonable sentence for the defendant." The presentence report stated that an upward departure might be at issue because of the defendant's high criminal history, therefore the defendant was given adequate notice.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Champion, 2001 WL 410090 (6th Cir. April 24, 2001). The defendant argued that his violation of 18 U.S.C. § 2251(a) for enticing a minor to engage in sexually explicit conduct for the purpose of a visual depiction was not a crime of violence because it did not have as an element, the use, attempted use, or threatened use of physical force against the person of

[2]Doyle at 893. ("parole . . . is nothing more than a conditional suspension of sentence . . . [and the sentence of the prisoner] does not expire because of the parole[ ] nor during the pendency of the parole[, and] during this time [the prisoner] is still in the custody of the penal authorities of the State and subject to the provisions upon which [he or she] has been paroled.")

another. The court found that Congress itself had "undertaken the fact-finding necessary to conclude that a violation of § 2251(a), by its very nature, presents a serious potential risk of physical injury" and held that the district court properly concluded that the defendant's § 2251(a) conviction was a crime of violence.

United States v. Walker, 181 F.3d 774 (6th Cir. 1999). the district court did not err in finding that the defendant's prior state court conviction for solicitation to commit aggravated robbery was a "crime of violence" and, therefore, the defendant was properly sentenced as a career offender.

United States v. Wilson, 168 F.3d 916 (6th Cir. 1999). The Court of Appeals held that the burglary of a building which is not a dwelling is not a crime of violence as defined in §4B1.2(a)(2) but that under certain circumstances maybe a crime of violence under the subsection's "otherwise" language. On remand the court could consider the burglary charge to decide whether the offense "otherwise involves conduct that presents a serious potential risk of physical injury to another."

United States v. Wood, 209 F.3d 847 (6th Cir. 2000). The defendant pled guilty to armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d). The presentence report (PSR) recommended that a "career offender enhancement" under §4B1.1 be applied after determining that the defendant had two prior convictions for crimes of violence – a 1978 breaking and entering and a 1993 robbery in the third degree. At sentencing the district court adopted the PSR's recommendation and sentenced the defendant as a career offender. On appeal the defendant argued that the prior conviction for robbery in the third degree was not a crime of violence because it did not meet the criteria set forth in §4B1.2(a) which required an element of force or threatened use of force. He further argued that the state statute governing this offense proscribed conduct which did not necessarily have to involve violence, threatened or actual, "against the person of another" as required by §4B1.2. The Sixth Circuit disagreed. Applying the criteria set forth in United States v. Wilson, 168 F.3d 916, 927[3] the court held that Alabama's robbery in the third degree was a "crime of violence" because robbery was an enumerated offense and because the statutory definition for the offense has as an element the use, attempted use, or threatened use of physical force against the person of another. The defendant's status as a career offender was affirmed.

[3]Wilson at 927. (interpreted §4B1.2 and its commentary as authorizing three ways in which a prior conviction could be considered a "crime of violence:" 1) if the conviction is for a crime that is among those specifically enumerated in the guidelines; 2) if it is for a crime that, although not specifically enumerated, has as an element of the offense the use, attempted use, or threatened use of physical force; or 3) if, although neither specifically enumerated nor involving physical force as an element of the offense, the crime involved conduct posing a serious potential risk of physical injury to another.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

United States v. Adu, 82 F.3d 119 (6th Cir. 1996). The district court did not err in denying defendant's request for a sentence reduction under 18 U.S.C. § 3553(f) and USSG §5C1.2. The district court's factual findings were not clearly erroneous. The defendant asserted that a statement in the presentence report that the he "may meet the provisions of 5C1.2," and the government's recommendation that he receive an acceptance of responsibility reduction under USSG §3E1.1 sufficed to qualify him for a reduction in sentence pursuant to §5C1.2. The defendant also contended that the government had the burden to show that he failed to comply with the fifth criterion set forth in §5C1.2. The government asserted that the defendant was not adequately forthcoming in providing information and, therefore, did not satisfy the fifth criterion. The circuit court held that the defendant bears the burden of proof to establish compliance, by a preponderance of the evidence, as the burden is allocated to the party seeking a departure. United States v. Rodriguez, 896 F.2d 1031, 1032 (6th Cir. 1990); United States v. Silverman, 889 F.2d 1531, 1535 (6th Cir. 1989), *cert. denied*, 507 U.S. 990 (1993). After conducting a fact-specific analysis, the district court concluded that the defendant did not meet the burden to show compliance with the fifth criterion. The circuit court stated that the applicability of a §3E1.1 reduction does not, by itself, establish a §5C1.2 reduction because the "requirement of USSG §5C1.2 that a defendant provide `all information he has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan' is greater than the requirement for an accpetance of responsibility reduction under USSG §3E1.1." *See* United States v. Wrenn, 66 F.3d 1, 3 (1st Cir. 1995); United States v. Ivester, 75 F.3d 182, 185 (4th Cir.), *cert. denied*, 116 S. Ct. 2537 (1996). The district court concluded that the defendant did not meet this standard, as he did not provide a "completely forthright account" of his involvement in the offense and the information he provided regarding conduct that was "part of the same course of conduct or of a common scheme or plan" was even less complete. The findings were not clearly erroneous.

United States v. Bazel, 80 F.3d 1140 (6th Cir.), *cert. denied*, 519 U.S. 882 (1996). The defendant raised an issue of his eligibility for application of the "safety valve" provisions of 18 U.S.C. § 3553(f) and USSG §5C1.2. The appellate court, using a de novo standard of review because the issue was "the proper construction of the Sentencing Guidelines, and not their application," affirmed the district court's decision that the defendant did not meet the criteria set forth in 18 U.S.C. § 3553(f)(4) and USSG §5C1.2(4). Under these provisions, the defendant must "not [be] an organizer, leader, manager, or supervisor of others in the offense, as determined under the Sentencing Guidelines and not [be] engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848." After finding that the defendant was an "organizer, leader, manager, or supervisor," the district court held that the defendant was not eligible for the "safety valve." The defendant argued, based on the presence of the conjunctive "and" within the criterion, that the government must prove that the defendant was not an "organizer, leader, manager, or supervisor" and also that he was not engaged in a CCE. The defendant contended that a denial of the safety valve based on the presence of one of the two requirements would be tantamount to replacing the "and" with an "or." The circuit court rejected this argument, concluding that the statute's criteria

are "phrased in terms of what the defendant must show was not true of him," rather than what the government was required to prove was true of the defendant. The circuit court also concluded that proper grammatical structure and the legislative history of section 3553(f) supports the district court's conclusion. With respect to legislative history, the court noted that section 3553(f) was intended to grant sentence reductions for individuals deemed merely to be drug "mules," rather than individuals with leadership roles in the offense. Under 21 U.S.C. § 848(c)(2)(A), an individual engaged in a CCE is defined, in part, as an "organizer . . . supervisor or any other [kind] of manage[r]." Consequently, the circuit court concluded that to read two separate requirements into the statute would render the "organizer, leader, manager, or supervisor" requirement redundant, because this requirement is included in the CCE definition. The district court's construction of the guidelines was correct.

United States v. Burnette, 170 F.3d 567 (6th Cir.), *cert. denied*, 120 S. Ct. 253 (1999). The district court did not err in applying separate consecutive section 924(c) convictions which occurred during a kidnapping and robbery. The defendant kidnapped a bank manager at her home and the next morning robbed the bank. The Sixth Circuit affirmed the imposition of the 5-year sentence for the first conviction and consecutive 20-year sentence for the second.

United States v. Clark, 110 F.3d 15 (6th Cir. 1997). The district court erred in holding that the defendant could not have his sentence modified to a term less than the mandatory minimum. The Sixth Circuit ruled that the safety valve provision, 18 U.S.C. § 3553(f), is applicable to cases pending on appeal, even if, as in this case, the safety valve provision was not in effect at the time of the original sentencing. In reaching this conclusion, the circuit court looked to the purpose statement of section 3553(f) which suggests that in order to further the statutes remedial intent, it should apply to cases pending on appeal when the statute was enacted. The court then noted that when a sentence is modified under 18 U.S.C. § 3582(c)(2), the court must consider the factors set forth in section 3553(a). These factors are consistent with application of the safety valve. Since an ex post facto violation would not occur by applying the safety valve upon modification—as the defendant would not be disadvantaged in such a case—the safety valve has been applied on remand for resentencing. *See* United States v. Flanagan, 80 F.3d 143, 144-45 (5th Cir.), *cert. denied* 116 S. Ct. 907 (1996); United States v. Polanco, 53 F.3d 893, 898-99 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 2555 (1996). Both 18 U.S.C. §§ 3553(a) and 3582(b)(2)-(3) indicate that if a sentence can be appealed and modified pursuant to 3742, it is not final. Likewise, section 3582(b)(1) is not final if it can be modified via section 3582(c). In either scenario, the defendant's sentence could be lowered below the statutory minimum and, thus, the safety valve is relevant. Therefore, the court held that the safety valve may be considered in pending sentencing cases and on remand before the district court on under section 3742 or 3582(c), the sentencing guidelines or other standards calling for the modification of sentences, and the case was remanded to the district court to determine if safety valve relief should be granted.

United States v. Maduka, 104 F.3d 891 (6th Cir. 1997). The appellate court affirmed the district court's interpretation of §5C1.2 criteria and its refusal to allow the defendant to rely on the guideline to avoid the statutory minimum sentence. The defendant argued that the court should have imposed a sentence below the statutory minimum because he qualified for relief pursuant to §5C1.2. The Circuit Court disagreed, and held that the defendant had not provided accurate and complete information to the government concerning the offenses charged in the indictment and,

therefore, §5C1.2 was inapplicable. Every court which has considered the issue has held that §5C1.2 requires a defendant to provide full disclosure regarding the immediate chain of distribution, regardless of whether the conviction was for a substantive drug offense or for conspiracy.

United States v. Pratt, 87 F.3d 811 (6th Cir. 1996). The district court did not err in applying the "safety valve" provision and in recognizing its discretion to depart downward when circumstances warranted a departure. The defendant was arrested with 4 kilos of cocaine in her luggage and pleaded guilty to possession with intent to distribute cocaine. She was subsequently sentenced to the applicable sentencing range within the discretion of the court for a mitigating role in the offense and acceptance of responsibility. The defendant argued on appeal that the district court did not recognize its discretion to sentence her to as little as 24 months based on the language in section 3553(f). The circuit court however held that this language alone does not provide a departure from the sentencing guidelines and affirmed the sentence imposed by the district court.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Gifford, 90 F.3d 160 (6th Cir. 1996). The circuit court reversed and remanded for entry of a revised restitution order because the district court erred in designating a total restitution amount in excess of the loss from the offense for which the defendant was convicted. The defendant, relying on United States v.Webb, 30 F.3d 687 (6th Cir. 1994), argued that the district court lacked the authority to impose any restitution obligation because the obligation ceased upon revocation of his probation. The defendant also argued that the district court erred in failing to credit him for restitution payments that were mistakenly forwarded to the wrong financial institutions. The circuit court rejected the defendant's first argument because the restitution order was a discrete part of the defendant's sentence, rather than a condition of his probation. Additionally, the circuit court did find that the district court had erred in not crediting the defendant for misdirected restitution payments that were sent to the wrong victim. The circuit court held that the defendant should not have to bear the brunt of this mistake. Similarly, the federal courts do not have the authority to force a defendant to pay more than the prescribed amount of restitution which is measured by the amount of the loss caused by the conduct underlying the conviction.

United States v. Scott, 74 F.3d 107 (6th Cir. 1996). The district court erred in its determination of the amount of restitution the defendant was required to pay to the victim bank. Using his position as a bank employee, the defendant defrauded the bank by causing $75,546.22 (including $1,709.00 in interest on the account) to be placed into fictitious accounts that he had created. Prior to termination of his employment with the bank, the defendant was negotiating a transaction for the bank which would have entitled the defendant to a $64,712.40 commission. He completed the transaction, and the bank retained the commission money. Upon conviction, the district court ordered the defendant to pay $74,547 in restitution to the bank. The defendant contends that the appropriate amount of restitution was $7,500, which was the loss to the bank minus the amount of the commission that he was entitled to. Noting that 18 U.S.C. § 3663(e)(1) states that victims should not receive restitution for losses for which they have or will receive

compensation, the court stated that the correct question for the court to ask was whether the restitution payment "results in the victim receiving compensation for the loss." Finding that the bank's retention of the commission was partial compensation, the circuit court concluded that the order of restitution was improper. The circuit court noted that while payment via a commission is "unusual," it can nonetheless only be characterized as compensation for the loss. The circuit court remanded the case to the district court "to determine by a preponderance of the evidence the commission [the defendant] would have earned."

§5E1.2 Fines for Individual Defendants

United States v. Breeding, 109 F.3d 308 (6th Cir. 1997). The district court did not err in assessing a fine to cover the costs of imprisonment and supervised release pursuant to USSG §5E1.2. The defendant asserted that §5E1.2(i) is invalid because the Sentencing Commission exceeded the scope of its authority in directing district courts to assess fines for costs of incarceration. The Sixth Circuit had refused to decide this issue on its merits in the past because the prior defendants had waived any rights to appeal the issue by failing to raise the issue before the district court. The appellate court agreed with the defendant that the issue was not waived in her case, because she was never put on notice that a fine for the costs of imprisonment would be imposed until the court imposed judgment. In addressing the defendant's claim on the merits, the appellate court held that the Sentencing Commission did not exceed its authority in assessing the fines. The defendant relied upon the decision of the Third Circuit that §5E1.2(i) is invalid because the Sentencing Reform Act did not specifically refer to recouping the costs of imprisonment as a goal of sentencing. In rejecting the Third Circuit's reasoning, the Sixth Circuit joined the majority of the circuit courts of appeals in holding that the Sentencing Commission acted within its authority. *See* United States v. Hagmann, 950 F.2d 186 (5th Cir. 1991), *cert. denied*, 506 U.S. 835 (1992); United States v. Turner, 998 F.2d 534, 536-38 (7th Cir.), *cert. denied*, 510 U.S. 1026 (1993); United States v. Leonard, 37 F.3d 32, 39-40 (2d Cir. 1994); United States v. May, 52 F.3d 885, 890-92 (10th Cir. 1995); United States v. Zakhor, 58 F.3d 464, 465-68 (9th Cir. 1995); United States v. Price, 65 F.3d 903, 908-09 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 2547 (1996). The Sentencing Reform Act required the Sentencing Commission to create sentencing policies that consider "the deterrent effect a particular sentence may have on the commission of the offense by others." The court relied on the Seventh Circuit's rationale in Turner that the guidelines call for longer sentences as the harm caused by the offense rises; longer sentences are more costly; thus, the costs of confinement rises with the seriousness of the offense, and a fine based on these costs reflects the seriousness of the offense. "Moreover, higher fines are more potent deterrents to crime. Section 5E1.2(i) increases the fine, and therefore, increases deterrence."

Part G Implementing The Total Sentence of Imprisonment

§5G1.3 Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

United States v. Johnson, 25 F.3d 1335 (6th Cir. 1994). The district court erred in sentencing the defendant to two consecutive terms for violating 18 U.S.C. § 924(c)(1) by possessing firearms while simultaneously trafficking in two separate controlled substances. The appellate court, citing the Sixth Circuit and other circuit precedent, congressional intent and the

rule of lenity, held that sensible construction dictates that possession of one or more firearms in conjunction with predicate offenses involving simultaneous possession of different controlled substances should constitute only one offense under §924(c)(1), and corresponding sentences should be for one offense only.

Part H Specific Offender Characteristics

§5H1.1 Age (Policy Statement)

United States v. Tocco, 200 F.3d 401 (6th Cir. 2000). In an appropriate case, a district court may depart downward on the basis of a "discouraged" departure factor or, more frequently, on the basis of simultaneously present, multiple "discouraged" departure factors. However, there must be credible evidence of the existence and extent of the factors relied upon by the district court.

§5H1.4 Physical Condition

United States v. Thomas, 49 F.3d 253 (6th Cir. 1995). The district court did not err in refusing to grant the defendant a downward departure because he was HIV positive, although he had not yet developed AIDS. The defendant argued that a downward departure was warranted because the guidelines had not taken into account recently available statistics showing the decreased life expectancy and increased cost of caring for people who are HIV positive. The circuit court agreed that these statistics were not available when the guidelines were written, but reasoned that the Commission had already considered the impact of the guidelines on persons who are HIV positive in its creation of USSG §5H1.4. The circuit court, citing a Virginia district court's rationale concerning the relationship between §5H1.4 and a defendant with AIDS, concluded that the defendant would be entitled to a departure "if his HIV has progressed into advanced AIDS, and then only if his health was such that it could be termed as an `extraordinary physical impairment.'" United States v. DePew, 751 F. Supp. 1195, 1199 (E.D. Va. 1990), aff'd on other grounds, 932 F.2d 324 (4th Cir.), *cert. denied*, 150 U.S. 873 (1991). The defendant was still in "relatively good health," and thus was not entitled to a departure.

See United States v. Tocco, 200 F.3d 401 (6th Cir. 2000), §5H1,1.

§5H1.6 Family Ties and Responsibilities, and Community Ties (Policy Statement)

See United States v. Tocco, 200 F.3d 401 (6th Cir. 2000), §5H1.1.

Part K Departures

§5K2.0 Grounds for Departure (Policy Statement)

United States v. Dalecke, 29 F.3d 1044 (6th Cir. 1994). The district court erred in granting a downward departure to the defendant because the factors upon which the court relied all were adequately contemplated by the sentencing guidelines. On appeal, the government argued that the defendant's downward departure was unjustified because it was based solely on factors already

taken into account by the sentencing guidelines. Additionally, the government argued that it was improper for the district court to justify a downward departure by aggregating guideline factors into a single mitigating circumstance. The defendant argued that the guidelines permit the aggregation factors that may not, each on its own, be adequate to warrant a departure. The Sixth Circuit agreed with the government, and held that "[t]he guidelines were written as specifically as possible considering the inherently complex and difficult subject with which they deal, [therefore] [t]hey must be applied on a factor-by-factor basis." United States v. Pozzy, 902 F.2d 133, 138 (1st Cir.), *cert. denied*, 498 U.S. 943 (1990).

United States v. Griffith, 17 F.3d 865 (6th Cir.), *cert. denied*, 513 U.S. 850 (1994). The district court properly refused to depart downward. The defendant argued that his effort to cure his gambling addiction was a factor that warranted a downward departure. The Sixth Circuit concluded that the defendant's claim was not cognizable because he failed to establish either that his sentence was the result of an incorrect application or that the district court failed to recognize its discretion to depart.

United States v. Rudolph, 190 F.3d 720 (6th Cir. 1999). Extraordinary post-sentence rehabilitation can constitute a valid downward departure basis in the Sixth Circuit. In such cases, the defendant's degree of post-sentence rehabilitation must seem extraordinary or exceptional when compared to the rehabilitation of other defendants.

§5K2.3 Extreme Psychological Injury (Policy Statement)

United States v. Bond, 22 F.3d 662 (6th Cir. 1994). The district court erred in departing upward based on extreme psychological injury. USSG §5K2.3. The defendants were convicted of armed bank robbery and challenged the district court's decision to depart upward. The circuit court vacated the defendants' sentences. Although the victims did suffer fear and anxiety, and two of the victims were temporarily transferred to another branch, the psychological injuries sustained did not satisfy USSG §5K2.3's requirement that the impairment be so substantial that it is of extended or continuous duration and manifested by physical or psychological symptoms. *See* United States v. Lucas, 889 F.2d 697 (6th Cir. 1989).

§5K2.6 Weapons and Dangerous Instrumentalities (Policy Statement)

United States v. Bond, 22 F.3d 662 (6th Cir. 1994). The district court erred in departing upward based on the use of a weapon or dangerous instrumentality. USSG §5K2.6. The defendants were convicted of armed bank robbery. They argued that the upward departure amounted to double-counting because USSG §2B3.1(b)(2)(A) already took into account their use of firearms. The circuit court agreed. The factors relied upon by the district court, that one of the gun shots narrowly missed one of the victims and that the defendants fired two separate shotgun blasts, did not occur "to a degree substantially in excess of that which ordinarily" occurs during a bank robbery.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

§6A1.2 Disclosure of Presentence Report; Issues in Dispute (Policy Statement)

United States v. Hayes, 171 F.3d 389 (6th Cir. 1999). The district court plainly erred by relying at sentencing on letters from victims which were not disclosed to the defendant. During sentencing, the court stated that it had received letters from people who were present during the defendant's bank robbery and that the court took them very seriously. The defendant and his attorney were unaware of the letters, as they were not disclosed in the presentence report. The appellate court held that Rule 32 required that the letters be disclosed and remanded for resentencing.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

United States v. Johnson, 120 S. Ct. 1114 (2000). The Supreme Court, in a unanimous decision, held that under 18 U.S.C. § 3624(e), a supervised release term does not commence until an individual "is released from imprisonment." Therefore, the length of supervised release is not reduced by excess time served in prison. The defendant had two of his convictions declared invalid, pursuant to Bailey v. United States, 516 U.S. 137 (1995), and had served 24 months extra prison time. The defendant was released from prison, but a three-year term of supervised release was yet to be served on the remaining convictions. The defendant filed a motion to reduce his supervised release term by the amount of extra prison time he served. The district court denied the relief, explaining that supervised release commenced upon respondent's actual release from incarceration, not before. The Sixth Circuit reversed and held that his supervised release term commenced not on the day he left prison, but when his lawful term of imprisonment expired. The Supreme Court, in its decision to reverse the Sixth Circuit, resolved a circuit split over whether the excess prison time should be credited to the supervised release term. *Compare* United States v. Blake, 88 F.3d 824 (9th Cir. 1996) (supervised release commences on date defendants should have been released, not dates of actual release) with United States v. Jeanes, 150 F.3d 483 (5th Cir. 1998) (supervised release cannot run during any period of imprisonment); United States v. Joseph, 109 F.3d 34 (1st Cir. 1997)(same); United States v. Douglas, 88 F.3d 533 (8th Cir. 1996)(same). The Supreme Court examined the text of § 3624(e) which states: "[t]he term of supervised release commences on the day the person is released from imprisonment." The Court concluded that the ordinary commonsense meaning of release is to be freed from confinement. The Court found additional support in 18 U.S.C. § 3583(a) which authorizes the imposition of a "term of supervised release after imprisonment." Furthermore, the objectives of supervised release would be unfulfilled if excess prison time were to offset and reduce terms of supervised release. Congress intended supervised release to assist individuals in their transition to community life.

United States v. Johnson, 120 S. Ct. 1795 (2000). The Supreme Court resolved a split in the circuits by holding that post-revocation penalties relate to the original offense, and under the *Ex Post Facto* Clause, a law "burdening private interests" cannot be applied to a defendant whose original offense occurred before the effective date of the statute. *Compare* United States v. Johnson, 181 F.3d 105 (6th Cir. 1999)(unpublished); United States v. Sandoval, 69 F.3d 531 (1st Cir.)(unpublished), *cert. denied*, 519 U.S. 821 (1996); United States v. St. John, 92 F.3d 761 (8th

Cir. 1996) (no *ex post facto* violation in applying § 3583(h) to a defendant whose offense occurred before date statute enacted) *with* United States v. Dozier, 119 F.3d 239 (3d Cir. 1997); United States v. Lominac, 146 F.3d 308 (4th Cir. 1998); United States v. Eske, 189 F.3d 536 (7th Cir. 1999), United States v. Collins, 118 F.3d 1394 (9th Cir. 1997); and United States v. Meeks, 25 F.3d 1117 (2d Cir. 1994) (because revocation penalties punish the original offense, retroactive application of § 3583(h) violates *Ex Post Facto* Clause). Absent a clear indication by Congress that a statute applies retroactively, a statute takes effect the day it is enacted.

In the case below, the Sixth Circuit held that application of § 3583(h)(explicitly authorizing reimposition of supervised release upon revocation of supervised release) did not violate the *Ex Post Facto* Clause even though the defendant's original offense occurred in 1993, a year before the statute was enacted. The lower court held that revocation penalties punish a defendant for the conduct leading to the revocation, not the original offense. Thus, because the statute was enacted before the defendant violated his supervised release, there was no *ex post facto* violation. United States v. Johnson, 181 F.3d 105 (6th Cir. 1999). The government disavowed the position taken by the lower court of appeal, and "wisely so" opined the Supreme Court "in view of the serious constitutional questions that would be raised by construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release." Johnson, 120 S.Ct. at 1800.

In addition to making the determination that *ex post facto* analysis for revocation conduct relates to the date of the original offense, the Supreme Court found that no *ex post facto* analysis was necessary in the defendant's case because Congress gave no indication that § 3583(h) applied retroactively. The statute could not be applied to the defendant because it did not become effective until after the defendant committed the original offense. Nevertheless, the version of § 3583(e)(3) in effect at the time of the original offense authorized a court to reimpose a term of supervised release upon revocation. Congress's unconventional use of the term "revoke" rather than "terminate" would not preclude additional supervised release, and this reading is consistent with congressional sentencing policy.

The Supreme Court's finding that the pre-Crime Bill version of § 3583(e)(3) authorizes supervised release as part of a revocation sentence resolved another split in the Circuits. The Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits held that § 3583(e)(3) did not authorize a court to impose an additional term of supervised release following revocation and imprisonment. The First and Eighth Circuits held that § 3583(e)(3) did grant a court such authority. *See* Johnson, 120 S. Ct. at 1800 (n. 2) (2000)(citing cases).

United States v. Sparks, 19 F.3d 1099 (6th Cir. 1994). The circuit court held that Chapter Seven policy statements "are not binding on the district court, but must be considered by it in rendering a sentence for a violation of supervised release." The circuit court remanded the case, holding that the district court erred in concluding that it lacked discretion to impose anything other than a consecutive sentence for defendant's violation of supervised release. *See* United States v. Cohen, 965 F.2d 58 (6th Cir. 1992). The court joined six other circuits which recognize Chapter Seven policy statements as advisory only.

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release

United States v. Coatoam, 245 F.3d 553 (6th Cir. 2001). The appellate court held that a court must revoke probation for refusing a drug test if it is a term of probation. The defendant

violated the terms of his probation by failing to attend drug testing, counseling, or mental health aftercare. The district court revoked his probation, stating that it had no discretion in its decision. The defendant appealed, arguing that the plain language of 18 U.S.C. § 3565(b)(3) did not apply to him. Section 3565(b)(3) requires mandatory revocation if a defendant refuses to comply with drug testing as imposed by § 3563(a)(4). Section 3563(a)(4) used to require a defendant to submit to drug testing as a mandatory condition of probation, that section was renumbered and is now found at § 3565(a)(5). The new § 3563(a)(4) imposes a mandatory condition of probation on defendants convicted of crimes of domestic violence, and requires offender rehabilitation counseling. Thus, the defendant contended that §3565(b)(3) did not apply to him because he was not convicted of a crime of domestic violence. The appellate court rejected this argument, concluding that Congress made a simple drafting error when it designated the mandatory condition for domestic violence at § 3565(a)(4), rather than (a)(5). The correct reading of § 3565(b)(3) is that the statute requires revocation of probation for failure to submit to drug testing when a defendant is required, as a condition of probation, to submit to drug testing.

United States v. Lowenstein, 108 F.3d 80 (6th Cir. 1997). The district court did not err in modifying and subsequently revoking the defendant's supervised release. The defendant argued that the district court could not modify the terms of his release without first finding that he had violated one of the terms set forth in the release order. In addition, the defendant argued that the evidence did not support either the violation finding upon which the modification was based or the violation finding upon which the revocation was based. The appellate court disagreed, and held that the defendant's reliance on USSG §7B1.3(a)(2) was misplaced. The court reasoned that the guideline did not provide that a violation was a necessary prerequisite for a modification of supervised release. Further, the provisions of the guideline demonstrate that a court can modify the conditions of a defendant's supervised release regardless of whether the defendant violated his existing condition. As to the defendant's second allegation, the court reasoned that a sentencing court may revoke a term of supervised release and incarcerate a defendant when the "court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release. In the instant case, the harassing phone calls made to an attorney in the Oakland County Probate Court and the unauthorized travel out of state were sufficient evidence of release violations.

United States v. Throneburg, 87 F.3d 851 (6th Cir.), *cert. denied*, 519 U.S. 975 (1996). The sentencing court did not err in holding the supervised release revocation hearing two years after the issuance of the violation warrant or in imposing the resulting sentence consecutive to a state sentence being served for another crime. With respect to the timing of the revocation hearing, the court noted that the violation warrant issued well within the three year term of supervised release and the hearing was held two years into the three-year period. The court rejected defendant's argument that his rights were prejudiced by this delay based on the assumption that if the federal court held the hearing and imposed the 24-month sentence earlier, the state Department of Corrections would have likely paroled the defendant to the federal sentence. The court adhered to the ruling of previous courts that delay violates due process only when it impairs the defendant's ability to contest the validity of the revocation. In this case, defendant admitted to violating the conditions of his supervised release and failed to provide support for his assertion that delay constitutes a due process violation. The court also rejected defendant's argument that his sentence upon revocation should be served concurrently with his state sentence. Although USSG §7B1.3

contains a policy statement directing the sentencing court to impose revocation sentences consecutively to other terms of imprisonment, the court recognized its discretion in this matter and provided an explanation as to the reason for imposing consecutive rather than concurrent sentences.

United States v. Twitty, 44 F.3d 410 (6th Cir. 1995). The district court erred in revoking the defendant's probation pursuant to 18 U.S.C. § 3565 based on conduct which occurred before the defendant was sentenced to probation. The district court had ruled that revocation of the defendant's probation was warranted because she was under an appearance bond at the time of her pre-probationary conduct which specified that she not commit any violation of federal, state or local law while released on bond. The district court held that this condition gave the defendant "fair notice" to remain crime free. The circuit court, while acknowledging that § 3565(a) grants courts authority to revoke probation for pre-probationary conduct, concluded that such revocation can occur only after the defendant has fair notice of the terms of probation that could result in revocation. *But see* United States v. James, 848 F.2d 160 (11th Cir. 1988). Thus, a defendant's probation may be revoked for conduct which occurs prior to the actual commencement of the probationary sentence, but not for conduct, such as the defendant's, which occurs prior to the date on which the defendant was sentenced to probation.

United States v. Hudson, 207 F.3d 852 (6th Cir. 2000). The defendant appealed his revocation sentence of nine months arguing that the district court erred in sentencing him to a term of incarceration in excess of the range applicable on the original charge. He reasoned that because the sentencing range for the underlying offense was 0-6 months, the district court could not impose a sentence greater than six months for violation of probation despite the policy statement in §7B1.4(a) which provides for a sentencing range of 3-9 months. However, the Sixth Circuit disagreed and held that 18 U.S.C. § 3565(a)(2) in no way restricts the sentencing court to the imposition of a sentence no greater than that originally applicable to the defendant but rather directs the court to *consider* the relevant policy statements issued by the Sentencing Commission.

APPLICABLE GUIDELINES/EX POST FACTO

United States v. Pierce, 17 F.3d 146 (6th Cir. 1994). The district court did not err in including preguidelines conduct as relevant conduct to determine the defendant's tax loss. The Sixth Circuit held that using preguidelines conduct to enhance the defendant's base offense level did not violate the ex post facto clause. *See* United States v. Ykema, 887 F.2d 697, 700 (6th Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990).

CONSTITUTIONAL CHALLENGES

Fifth Amendment—Double Jeopardy

See United States v. Johnson, 25 F.3d 1335, 1339 (6th Cir. 1994), §5G1.3, p. 24.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 3582

United States v. Lively, 20 F.3d 193 (6th Cir. 1994). The defendant pleaded guilty to mail fraud for defrauding mail order companies of over $30,000 worth of merchandise. She challenged the district court's decision to impose six months of imprisonment rather than home confinement. In a case of first impression, the Sixth Circuit held that, in the creation of its sentencing table, the Sentencing Commission adequately considered the various competing policy aims of providing a definite prospect of imprisonment for economic crimes like fraud and a congressional mandate that:

> The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation . . .

18 U.S.C. § 3582(a). Because the defendant's sentencing range was 6-12 months, placing her in Zone B, the district court did not err in imposing a sentence of 6 months imprisonment even though the court could have sentenced the defendant to various less restrictive alternatives.

18 U.S.C. § 3583

United States v. Hancox, 49 F.3d 223 (6th Cir. 1995). The district court erred in denying the government's motion for revocation of the defendant's supervised release. The defendant admitted that she had used drugs on numerous occasions while on supervised release. The district court elected not to revoke, because she had been admitted into an in-patient drug treatment program and had been making progress since her arrest. On appeal, the appellate court agreed with the government that 18 U.S.C. § 3583(d) mandates the termination of supervised release upon evidence that the defendant possessed a controlled substance. The appellate court noted that "use" constitutes "possession" for purposes of the statute, joining the First, Third, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits. *See* United States v. McAfee, 998 F.2d 835 (10th Cir. 1993); United States v. Dow, 990 F.2d 22 (1st Cir. 1993); United States v. Rockwell, 984 F.2d 1112 (10th Cir.), *cert. denied*, 508 U.S. 966 (1993); United States v. Courtney, 979 F.2d 45 (5th Cir. 1992); United States v. Baclaan, 948 F.2d 628 (9th Cir. 1991); United States v. Blackston, 940 F.2d 877 (3d Cir.), *cert denied*, 502 U.S. 992 (1991); United States v. Oliver, 931 F.2d 463 (8th Cir. 1991); and United States v. Dillard, 910 F.2d 461 (7th Cir. 1990). The sentence was vacated and the case was remanded for resentencing. "Pursuant to 18 U.S.C. § 3583, the district court was required to revoke Hancox's supervised release and to sentence her to 20 months in prison. Twenty months is one-third of her supervised release term of five years. The district court had no discretion to disregard the mandate of the statute."

18 U.S.C. § 3583(e)(1)

United States v. Spinelle, 41 F.3d 1056 (6th Cir. 1994). In addressing an issue of first impression, the appellate court held that "a district court has discretionary authority to terminate a term of supervised release after the completion of one year, pursuant to 18 U.S.C. § 3583(e)(1), even if the defendant was sentenced to a mandatory term of supervised release under 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 3583(a)." The appellate court reasoned that sentencing and post-sentence modification are "two separate chronological phases," and seen as such, "the statute mandating a specific sentence of supervised release [in this case, three years] and the statute authorizing the termination of a prior imposed sentence are quite consistent." Thus, the defendant, sentenced to a mandatory three-year term of supervised release under the provisions of the Anti-Drug Abuse Act of 1986, at 21 U.S.C. § 841(b)(1)(C) was properly sentenced, and the district court properly exercised its discretion pursuant to 18 U.S.C. § 3583(e)(1) to terminate the supervised release after the completion of one year.

18 U.S.C. § 3742

United States v. Lavoie, 19 F.3d 1102 (6th Cir. 1994). In an issue of first impression, the Sixth Circuit held that pursuant to 18 U.S.C. § 3742(a), which makes an incorrect application of the guidelines appealable, a guidelines sentence is appealable "if the appealing party alleges that the sentencing guidelines have been incorrectly applied, even in cases where the guideline ranges advocated by each of the parties overlap."

POST-*APPRENDI* (*APPRENDI* V. NEW JERSEY, 530 U.S. 466 (2000))

United States v. Corrado, 227 F.3d 528 (6th Cir. 2000). The defendant was convicted of a RICO conspiracy in violation of 18 U.S.C. § 1962(d). On appeal, the defendant argued that in the context of a RICO conspiracy, the district court violated the *Apprendi* rule by applying the preponderance of the evidence standard in determining the underlying offenses and by not submitting the issue to the jury. The court found that the defendant faced a maximum sentence of 20 years on the RICO conspiracy counts, disregarding the murder conspiracy. The court held that because the district court did not sentence defendant to a term of more than 20 years on the RICO counts, even considering the murder conspiracy, *Apprendi* was not triggered.

United States v. Flowal, 234 F.3d 932 (6th Cir. 2001). The defendant was convicted of possession with intent to distribute cocaine and was sentenced to life imprisonment without parole due, in part, to the district court's determination of the weight of drugs involved in the defendant's case. The indictment specifically charged the defendant with possession of 5.2 kilograms in violation of 21 U.S.C. § 841(b)(1)(A). However, two approximate drug weights were submitted for consideration at sentencing. One approximation calculated the drug amount to be 5.2 kilograms which, under 21 U.S.C. § 841(b)(1)(A), exceeded the five or more kilograms of cocaine necessary to trigger the mandatory life imprisonment without parole. The other calculated the drug amount to be 4.997 kilograms which, under 21 U.S.C. § 841(b)(1)(B), required consideration of life imprisonment, but would not make such a penalty *mandatory*. The district court found, by a preponderance of the evidence, that 5.2 kilograms of cocaine were possessed by the defendant and sentenced the defendant to life without parole. On appeal, the defendant argued that because the amount of drugs at issue determined the appropriate statutory punishment, a jury should have determined the weight of the drugs beyond a reasonable doubt. The Sixth Circuit agreed, and reversed and remanded the determination of the weight of drugs, concluding that the district court judge's determination effectively limited the range of applicable penalties and deprived the defendant of the opportunity to receive less than life imprisonment without parole.

United States v. Harper, 246 F.3d 520 (6th Cir. 2001). The defendant pled guilty to conspiracy to distribute and possession with intent to distribute marijuana. He stipulated to 1108 pounds of marijuana and also had a prior felony conviction. The presentence report (PSR) indicated that the defendant, while in pre-trial detention, sent a letter to a co-defendant to cover-up evidence of their offenses. The PSR recommended a two-level upward adjustment for obstruction and made no recommendation for acceptance of responsibility. The defendant was sentenced to 168 months. On appeal, the defendant argued that his sentence was unconstitutional under *Apprendi* because neither the amount of drugs for which he was sentenced nor the facts

establishing the obstruction of justice adjustment were proven by the government beyond a reasonable doubt. The court held that because the defendant had a prior felony conviction and because he stipulated to responsibility for approximately 500 kilograms of marijuana, the defendant was subject to the mandatory minimum of ten years with a maximum of life anyway, pursuant to 21 U.S.C. § 841(b)(1)(B).

United States v. Ramirez, 242 F.3d 348 (6th Cir. 2001). The defendant was convicted of conspiracy to distribute cocaine and attempt to possess cocaine with intent to distribute but the indictment did not specify the amount of cocaine involved or any other facts regarding the drug crime. At sentencing the district court found that the quantity of cocaine involved was ten kilograms, an amount greater than the five kilograms necessary to trigger the 20-year statutory minimum under 21 U.S.C. § 841(b)(1)(A). Considering the defendant's prior drug conviction and the drug quantity amount determined, the district court sentenced the defendant to the 20-year mandatory minimum required under 21 U.S.C. § 841(b)(1)(A). On appeal, the defendant challenged as an Apprendi violation the increase of his penalty from a nonmandatory minimum sentence to a mandatory minimum of 20 years because the increase was due, in part, to the quantity of drugs involved that had not been alleged in the indictment and submitted for jury determination. The Sixth Circuit agreed. Citing United States v. Flowal, 234 F.3d 932 (6th Cir. 2000), the court found that "the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed," such as moving up the scale of mandatory sentences, invokes the full range of constitutional protections required for "elements of the crime." The court concluded that aggravating factors, other than a prior conviction, that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved.

United States v. Rebmann, 226 F.3d 521 (6th Cir. 2000). The defendant pled guilty to distribution of heroin in violation of 21 U.S.C. § 841(a)(1). The plea agreement provided that defendant understood her maximum term of imprisonment to be 20 years, but, if the district court found that death resulted from the distribution, the sentencing range would be from 20 years to life. At sentencing, the district court determined by a preponderance of the evidence that the death of the defendant's ex-husband was caused by her distribution of heroin. Defendant was sentenced to 24 years and 4 months, in excess of the 20-year maximum for distribution of heroin. On appeal, the defendant argued that the determination that the resulting death was caused by heroin distribution was clearly erroneous and in violation of *Jones* and *Apprendi*. Because the provisions at issue were factual determinations that resulted in an increased maximum penalty, the determination of the causal relationship between death and the distribution of heroin was an element that had to be determined beyond a reasonable doubt.